OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 12, 2003

Mr. J. Greg Hudson
Thomas Hudson & Nelson, L.L.P.
3305 Northland Drive, Suite 301
Austin, Texas 78731

OR2003-3169

Dear Mr. Hudson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180861.

Collin County (the "county"), which you represent, received three requests for information pertaining to a Request for Proposals for electronic voting equipment. You claim that a portion of the requested information is excepted from disclosure under section 552.104 of the Government Code. You further state that some of the requested information may be confidential as proprietary financial information or trade secrets, but make no arguments and take no position as to whether the information is so excepted from disclosure. You inform this office and provide documentation showing that you have notified Diebold Election Systems, Inc. ("Diebold"), Election Systems & Software ("ESS"), and Hart InterCivic, Inc. ("Hart"), the interested third parties whose proprietary interests are implicated by the requests, of the requests for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). Diebold, ESS, and Hart responded to the notices and each asserted that section 552.110 of the Government Code excepts their company's proposal, or portions thereof, from public disclosure. Diebold and Hart also asserted that sections 552.101 and 552.104 of the Government Code except each company's proposal, or portions thereof, from

public disclosure. We have considered the claimed exceptions and reviewed the submitted information.[1]

We begin by noting that you have not fully complied with section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

> (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.
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> (b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

It appears from the documents submitted to this office that the county received the request for information related to Diebold on February 25, 2003. However, you did not raise section 552.104 as an exception to disclosure until March 22, 2003, well after the ten business day period mandated by section 552.301(b) of the Government Code. Therefore, we find that you have waived this exception. *See* Gov't Code § 552.301, .302; *see also* Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 522 (1989) (discretionary exceptions in general).

Furthermore, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written

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[1]We note that while Hart claims exceptions to the disclosure of its sample Collin County voter education program, time schedule, future development, detailed proposal, eSlate system standard reports, eSlate Training Program, and cost proposal, the county did not submit this information to this office, and therefore this ruling does not address that information.

request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office a copy of the written request for information from Diebold, nor did you submit responsive information of Hart or ESS within the fifteen business day deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301(e) results in the legal presumption that the information is public and must be released. Thus, the responsive information is presumed public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). We will therefore address the third party arguments against disclosure of this information.

Both Diebolt and Hart claim that their proposals, or portions thereof, are excepted from disclosure under section 552.104 because release would give advantage to a competitor or bidder. However, we note that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The county has not timely argued that the release of either of these proposals would harm its interests in a particular competitive situation. Therefore, no portion of the submitted proposals of Diebolt and Hart may be withheld from disclosure pursuant to section 552.104 of the Government Code.

Diebold and Hart also raise section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that other law deems to be confidential. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Hart has

not directed our attention to any law, nor are we aware of any law, under which any of the information that Hart seeks to have withheld is deemed to be confidential for purposes of section 552.101. Thus, Hart has not demonstrated that section 552.101 is applicable to any of its information.

Diebold contends that section 262.030 of the Local Government Code, in conjunction with section 552.101, prohibits the disclosure of its proposal. Section 262.030(c) provides a competitive proposal procedure for the purchase of high technology items by a county, and states in pertinent part:

> (c) If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such.

Loc. Gov't Code § 262.030(c). As a general rule, the statutory confidentiality protected by section 552.101 requires express language making certain information confidential or stating that information shall not be released to the public. Open Records Decision No. 478 (1987). By its plain language, section 262.030(c) does not expressly make bid proposals confidential. Section 262.030(c) only requires a governmental body to take adequate precautions to protect bid proposals from competing bidders. The county has taken the necessary precautions by withholding the information and requesting an open records ruling from this office. Accordingly, we find that the bidding information is not made confidential under section 262.030(c). Thus, the county may not withhold Diebold's proposal under section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code.

Diebolt, ESS, and Hart each claim that portions of each company's respective proposal are excepted from public disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).[2] This office must accept a claim that information subject to the Act is excepted as

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[2]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

> (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 661 (1999); *see also National Parks*, 498 F.2d at 770.

In this instance, Hart does not explain how the submitted information meets the Restatement definition of a trade secret. Nor does Hart address the six factors that are relevant to the question of whether a private party has made a *prima facie* case under section 757 of the Restatements. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). We therefore conclude that Hart has not demonstrated that any of the information in question constitutes a protected trade secret under section 552.110(a) of the Government Code. We further find that Hart has failed to provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the submitted information. Thus, we conclude that Hart has not adequately demonstrated that its information either consists of trade secrets or would harm its competitive interests if released. Consequently, the submitted information of Hart is not excepted from disclosure under section 552.110.

After reviewing the arguments submitted by Diebold and ESS and the information at issue, we conclude that each company has established a *prima facie* case that most of the information at issue is a trade secret. Because we have received no argument to rebut either company's claim as a matter of law, the county must withhold the information that we have marked under section 552.110(a). *See* Open Records Decision Nos. 552 (1990); 437 (1986); 306 (1982); 255 (1980) (customer lists may be withheld under predecessor to section 552.110). However, we find that Diebold and ESS have failed to establish that the remaining submitted information constitutes a trade secret of the respective company. *See* Open

Records Decision No. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, and experience not excepted). Therefore, the county may not withhold the remaining information of Diebold or ESS under section 552.110(a).

Furthermore, Diebold and ESS have failed to provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the remaining submitted information. Thus, we conclude that neither Diebold nor ESS has adequately demonstrated that release of the remaining submitted information would harm its competitive interests. Consequently, the remaining submitted information of Diebold and ESS is not excepted from disclosure under section 552.110(b).

The submitted information also contains e-mail addresses obtained from members of the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential. Section 552.137 provides:

> (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
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> (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, to the extent that e-mail addresses of members of the public are not otherwise protected from disclosure under section 552.110, the county must withhold such e-mail addresses under section 552.137. We have marked a representative sample of the type of information that is excepted from disclosure under section 552.137. Please note, however, that section 552.137 does not make confidential a company's website or a public employee's governmental e-mail address.

To summarize, we have marked the information that the county must withhold under section 552.110. E-mail addresses of members of the public who have not consented to release must

be withheld under section 552.137. The remaining submitted information must be released to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 180861

Enc. Submitted documents

c: Mr. George S. Robinson, Ph.D.
President, GSR Consulting, Inc.
5044 Bridge Creek Drive
Plano, Texas 75093
(w/o enclosures)

Mr. Eric A. Anderson, General Counsel
Election Systems & Software
11208 John Galt Boulevard
Omaha, Nebraska 68137-2364
(w/o enclosures)

c: Ms. Michelle Simpkins
Winstead Sechrest & Minick
100 Congress Avenue, Suite 800
Austin, Texas 78701
Attorney for Diebold Election Systems, Inc.
(w/o enclosures)

Mr. Les Gay
Administrative Services Manager
Hart InterCivic, Inc.
15500 Wells Port Drive
Austin, Texas 78728
(w/o enclosures)